

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

NO.

77-6111

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF
AND
SOUTH END EDUCATION COMMITTEE, ET AL
INTERVENING PLAINTIFFS

V.

BOARD OF EDUCATION OF WATERBURY,
CONNECTICUT, ET AL,

DEFENDANTS

DEFENDANTS' APPEAL FROM UNITED STATES
DISTRICT COURT, DISTRICT OF CONNECTICUT,
ORDER DATED JUNE 10, 1977 APPROVING
MAGISTRATE'S REPORT ON REMEDIAL PLANS
AND ORDERING DEFENDANTS TO IMPLEMENT
"AMICUS PLAN C" PROPOSED BY BARNARD
SCHOOL P.T.A., INC., AS AMICUS CURIAE

BRIEF FOR THE APPELLANT

CITY OF WATERBURY BOARD OF EDUCATION, ET AL

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STATEMENT OF THE ISSUES

1. Did the Court err in its conclusion that, in evaluating the defendants' school desegregation plans, it did not have to decide whether the defendants had a purpose and intent to segregate elementary school children?

2. Should the Court have intervened and ordered the adoption of an alternative desegregation plan affecting 3 elementary schools of a 35 school system where the Report of the Special Master and the record demonstrated extensive attempts to comply with the consent decree?

STATEMENT OF THE CASE

This school desegregation case was commenced by the Attorney General of the United States under 42 U.S.C. §. 2000c-6 in October, 1969, against the Board of Education of the City of Waterbury, the Superintendent of Schools and the City; the complaint (Appendix, Page 1) alleged purposeful discrimination against Negro and Puerto Rican pupils in the operation of the public elementary schools and sought injunctive relief. The defendants claimed that the concentration of minority students in certain schools resulted from neighborhood residential patterns, not from deliberate official policy, and that they were taking affirmative action to eliminate racial identity of the City's schools.

In June 1973 before trial was begun the parties entered into a Consent Order (Appendix, Page 7). The Order noted certain significant steps already taken by the defendants to eliminate segregation of the elementary schools: (1) two of the schools with the highest concentration of black and Puerto Rican students had been closed as regular schools and were established to house students in a special educational program called "FOLLOW-THROUGH", (2) a program called "PROJECT: CONCERN: had been established and had resulted in a number of black students attending school in substantially all-white school districts, (3) defendants had planned and were then implementing the first stage of a school construction program to establish three middle school complexes each of which was intended to house students in Grades 6 - 8, the first of which (the EAST END MIDDLE SCHOOL) was scheduled to open in September 1974, and (4) an additional program had been undertaken to insure equal educational opportunities to non-English speaking students.

Prospectively, the parties agreed in the balance of the Consent Order that three middle school complexes would be constructed as proposed, that the zone or school district lines of the schools housing those pupils in the lower grades, kindergarten through grade five (K - 5 schools) would be redrawn so as

to obtain the greatest amount of desegregation possible, and that the resulting school system would be satisfactorily desegregated. To the Consent Order there was appended an Attachment A (Appendix, Page 14) (thereafter, most frequently referred to as PLAN A) which, inter alia, set out attendance areas or districts for each of the proposed middle schools and specified zones for the K-5 schools feeding the middle schools as well as the school buildings to be utilized to house K-5 pupils in each zone. The Consent Order further required the defendants to devise, adopt and implement a student assignment plan for elementary (K-8) students in the City public school system to achieve the greatest amount of desegregation possible, considering the practicalities, and to place such plan into effect in such fashion that the burden of desegregation would not fall more heavily upon students of one race or national origin than upon students of another race or national origin. The plan was to specify attendance areas for each middle school and for the K-5 schools feeding them, and to specify the school buildings to house the K-5 students. In this connection, the zone lines and buildings set out in PLAN A were not required to be adopted but the results projected thereunder were to serve as a guide in determining whether the final plan substantially conformed to requirements of the Consent Order. The final plan was to be phased into operation in three steps: (1) the provisions affecting the East End Middle School and K-5 feeder schools in that area upon the opening of the East End Middle School in September 1974, (2) as to the West End Middle School area, upon the completion of the West End Middle School or September 1975, at the latest, and (3) as to the North Central area, upon the completion of the North Central Middle School or September 1977, at the latest. In default of substantial compliance with the target dates set for implementing the desegregation plan in each of the areas, the defendants were required to implement reasonable interim desegregation measures in each middle school area so affected unless they made timely application for modification of the Consent Order. The plan was to contain racial/ethnic projections

of student enrollment for each school and was to be filed by January 15, 1974, and served upon the plaintiff. Finally, the Consent Order provided that, in the event the parties were unable to agree upon the sufficiency of the plan, a hearing would be scheduled to determine whether the plan substantially complied with the Order.

On January 16, 1974 the defendants filed a (First) Supplement to the Consent Order (Appendix, Page 31), proposing a final desegregation plan termed PLAN H. (Appendix, Page 33).

There began an exchange of letters between counsel for the parties commencing February 1974 regarding Plan H in which the government, in general, sought additional data about the plan and its proposed operation and the City furnished it. It appears that much of this correspondence subsequently was introduced at a hearing on defendants' Motion to adopt Plan H (in an updated form) conducted by Judge Murphy in June 1976 as Defendants' Exhibits A through L.

In May 1975 the Court entered an Order (Appendix, Page 45) permitting the South End Education Committee, an unincorporated organization of Puerto Rican parents and community leaders, and sixteen individual parents of Puerto Rican origin or descent whose children were students in the Waterbury public schools, to intervene as party plaintiffs. The South End plaintiffs argued that PLAN H unduly burdened the Hispanic community and gave inadequate attention to bi-lingual education. They were allowed to file a complaint which was, in significant respects, patterned after the Government's original complaint. The Order on intervention (granted pursuant to Rule 24(b)(2), Fed. R. Civ. P., specifically provided that no claim or defense or question resolved by the Consent Order could be reopened and further ordered that all parties, including the South End plaintiffs, were to expedite evaluation of PLAN H, and failing agreement on the plan as it then existed or might thereafter be modified, to proceed with dispatch to a hearing thereon as provided in the Consent Order. In June of 1975 the South End plaintiffs commenced discovery

with respect to PLAN H. This continued through April and May of 1976 when the South End plaintiffs noticed and took eight depositions of members of the Board of Education, the Superintendent of Schools, and other employees of the Board.

Also, in June 1975, through counsel, the City filed an updated PLAN H (dated April 1975) (Appendix, Page 53). Among other things, this recognized that the East End Middle School had gone into operation in September 1974, and substituted data on procedures already implemented there for the earlier PLAN H's projected data and recommended procedures.

In July 1975 the defendants moved to amend Paragraph 4 of the Consent Order (Appendix, Page 11) to change the effective date for specifying new attendance zones for the West End Middle School district to conform to the new anticipated date of completion of that school in March 1976. This was granted October 23, 1975. Also, in July 1975 the defendants moved for an order approving the updated PLAN H (April 1975).

A hearing on PLAN H was had on June 9, 11, 16 and 17, 1976 before Judge Murphy. The principal issue at that hearing was whether PLAN H conformed to the Consent Order, and in particular, did the West End Middle School area proposals of PLAN H so conform?

The Government and the South End plaintiffs agreed that PLAN H followed the outline of PLAN A, except in the West End portion where PLAN H did not close predominantly white schools (Barnard and Duggan, both K-5 schools), but closed Maloney (predominantly Hispanic) and withdrew Croft School entirely from the Plan. The Court agreed with the plaintiffs that the closing of Maloney and Croft left no school in the predominantly Hispanic neighborhood, and as a result required a disproportionate number of minority children to be bused. This, the Court held, caused the burden of desegregation to fall more heavily upon the minority group children. Accordingly, the Court held that part of PLAN H referring to the West End to be in violation of the Consent

Order. (Memorandum, Murphy, D. J., August 20, 1976, (Appendix, Page 76).

On September 1, 1976 the Court entered an Order enjoining the defendants from implementing that portion of PLAN H found in violation of the Consent Order per the Memorandum of August 20th, and requiring the defendants to submit an alternative desegregation plan on or before December 1, 1976, and gave leave to the other parties to submit any counter proposal to the Court on or before December 15, 1976.

December 2, 1976, the defendants submitted a Third Supplement to the Consent Order to which attached a Plan termed, "December 1976, PLAN H Update". (Appendix, Page 82). This amended PLAN H with respect to Maloney, Barnard and Duggan schools which were proposed as the K-5 schools for the subject area effective September 1977, and consisted of two alternatives. At the same time, the defendants moved to modify the Consent Order with respect to the date set for the phase-in of North End Middle School Complex, then under construction, and attendant redistricting, to a later date consistent with the projected completion of that complex, namely, no later than September 1978. (This was granted March 7, 1977.)

December 17, 1976, the United States filed a Response to the Order of September 1, 1976 and a Counter Proposal to Defendants December 1976 Plan Update. This suggested a cluster of Barnard, Duggan and Maloney schools, and assigning all affected 1st and 2nd grade students to Barnard, all 3rd and 4th grade students to Maloney, and all 5th and 6th (sic) grade students to Duggan. (Appendix, Page 89). Further, the appointment of a Special Master to produce a plan for these schools was suggested.

On January 4, 1977, the Court entered an Order of Reference appointing the Honorable Arthur H. Latimer, U. S. Magistrate, as a Special Master pursuant to the Federal Magistrates Act and Rule 53, Fed. R. Civ. P. to review, hear and submit proposed rulings as to any and all matters pending in this action during the absence of Murphy, D.J., from the District.

On February 14, 1977 the Government filed its "Proposed Plan for the Desegregation of Maloney School" prepared by Warren B. Buford. This proposed closing Barnard and reassigning pupils to Maloney and to Duggan, both of which remained as K-5 schools. Two alternative methods of accomplishing this were proposed (Appendix, Page 94).

On the same date, the South End plaintiffs filed a Pleading concurring in the Buford Plan, and asking that the defendants be required to make repairs and improvements so as to make Maloney a safe and effective building. They further requested a long-range commitment that the next capital construction project undertaken by the City be a new elementary school in the Maloney district and concurred with prior statements of defendants concerning the inadvisability of using Maloney on a long term basis. (Appendix, Page 104(a)).

On February 16, 1977 the defendants filed a Revised Motion regarding the Plans previously submitted, withdrawing these, and suggesting Barnard, Maloney and Duggan schools all be retained as K-5 schools as one contiguous district on an open enrollment basis. This Plan is termed ATTACHMENT PLAN "A". (Appendix, Page 106).

On March 4, 1977, the Barnard School P.T.A., Inc., a non-profit corporation, moved in the alternative to intervene as a defendant or for permission to appear as Amicus Curiae. On March 8, 1977, Barnard P.T.A. was denied leave to intervene, but the alternative request to participate as Amicus Curiae was granted with permission to participate in argument on proposed pleas and to offer its own alternative plans. Legal arguments on any and all plans to be held April 18, 1977.

Barnard P.T.A. proceeded to notice and take several depositions (11 in number) of Barnard School parents and faculty.

On April 11, 1977, the Barnard P.T.A. filed its Brief and Alternative Plans. (Amicus Plans A, B and C, Appendix, Page 180).

On April 18th, argument on any and all plans was held before the Honorable Arthur H. Latimer, who entered a Ruling on Remedial Plans, April 28,

1977. (Appendix, Page 183). This permitted a test of the defendants' Attachment PLAN A (open-enrollment) by means of a mailing to measure the response of the parents in the district; if the response showed an insufficient level of resulting desegregation, Amicus Plan C was designated as a reserve plan and would be immediately ordered into effect, absent any acceptable further proposal from defendants. Amicus C would leave Duggan as a special education center only, with its minority pupils in regular classes reassigned to Barnard and its white pupils in regular classes reassigned to Maloney.

Certain objections were thereafter filed to the Magistrate's Report of April 28th, by the United States and the South End plaintiffs. (See Appendix, Pages 202 and 204). On May 16th a hearing was held on these before Judge Murphy. The letter to the parents proposing the open-enrollment plan (Attachment PLAN A) was entered on the record, and a schedule for mailing this and reporting the results was set.

On June 9, 1977, the Board of Education filed its PLAN Z, proposing that 25 volunteers of Hispanic ancestry be bused from Maloney to Barnard; that 75 Barnard children living the furthest distance from Barnard be bused to Maloney, and that the Board review and modify Duggan and Barnard district lines to achieve the greatest degree of racial balance.

On June 10th, the Court continued the Hearing on objections to the Special Master's Report and the Report on the Court Ordered Survey on open-enrollment plan (Attachment PLAN A). Attorney Asmar moved for permission to appear as Amicus Curiae for parents of Duggan school children. Defendants orally moved acceptance of PLAN Z. On June 13th, Attorney Asmar's Motion was denied, but he may be heard on behalf of the Duggan parents at any hearing on this matter. A further Order was entered approving and concurring in Magistrate Latimer's Ruling on Remedial Plans as filed April 28, 1977, and approving Amicus Plan C. The defendants were ordered to make preparations at once to have such plan fully operative September 7, 1977. (Murphy, Senior U.S.D.J.).

On July 21 1977, a Notice of Appeal from Judge Murphy's Order
Supplementing Amicus Plan C was filed by the defendants.

ARGUMENT

1. DID THE COURT ERR IN ITS CONCLUSION THAT, IN EVALUATING THE DEFENDANTS' SCHOOL DESEGREGATION PLANS, IT DID NOT HAVE TO DECIDE WHETHER THE DEFENDANTS HAD A PURPOSE AND INTENT TO SEGREGATE ELEMENTARY SCHOOL CHILDREN?

In an earlier stage of this case, the Court held hearings in June, 1976 to determine whether "Plan H" conformed to the Consent Decree, and more particularly, whether that portion of the plan affecting the West End conformed to the decree. (Memorandum, August 20, 1976, page 7, Appendix at page 71). In this Memorandum the Court noted that the effect of the plan in the West End resulted in busing 5.5% of the white, 22.5% of the black, and 65.3% of the Hispanic children. (Memo, page 9, Appendix, Page 73). The Court noted the difficulty of deciding from this data alone (there was no other data considered at all) whether the defendant School Board intended, by Plan H, to discriminate and held that the Court did not have to decide the question: "We are satisfied that we do not have to decide this difficult constitutional question - - - " (Memo, page 9, Appendix, page 73) and concluded that Plan H violated the Consent Decree "because the burden of desegregation falls more heavily on minorities in the West End portion of Plan H." Subsequent to the Plan H discussed in that Memorandum other plans were offered by defendants. All concerned the same Croft/Maloney/Barnard/Duggan School area and all were evaluated in the same way.

In evaluating any of these plans, the Court was evaluating a remedy. As to such, "the task is to correct by a balancing of the individual and collective interests 'the condition that

offends the Constitution.' A federal remedial power may be exercised only on the basis of a constitutional violation' and, 'as with any equity case, the nature of the violation determines the scope of the remedy.' " Milliken v. Bradley, 418 U. S. 717, 738 (1974) (Milliken I) quoting Swann v. Charlotte-Mecklenberg Board of Education, 402 U. S. 1, 16 (1971). See also Austin Independent School District v. United States U.S. 50 L.Ed.2d. 603 (1976). See also Pasadena City Board of Education v. Spangler, 427 U. S. 424, 434 (1976).

It is true that by the Consent Order the defendants had agreed to do certain things and to achieve a desegregated school system. However there is not a great deal of difference between constructing a remedy to correct a situation and evaluating one already constructed. These defendants had avoided adopting a specific plan. They had ensured that the Plan attached to the Consent Order was only a guideline and agreed only to "substantial" conformance. See also transcript of remarks in Judge Murphy's Chamber at signing of the Consent Decree on June 8, 1973, set out in the Appendix at page .

The Ruling on Remedial Plans (Appendix, page 183) prepared by the Honorable Arthur H. Latimer, U. S. Magistrate (April 28, 1977) follows the same reasoning as Judge Murphy's earlier Memorandum in evaluating later plans.

In connection with this line of argument, it is important to note that the Consent Decree itself requires considerable interpretation: "greatest amount of desegregation possible, considering the practicalities" "burden of desegregation" to quote only two phrases, are not terms of precise definition. There is at least as much ambiguity here as was found in the "No Majority of any

Minority" requirement in Spangler. Also, if "a final decree entered by a Court of equity may be modified if circumstances of law or fact obtaining at the time of its issuance have changed or new ones have since arisen" [Spangler, citing Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How 421 (1856); United States v. Swift & Co. 286 U. S. 106 (1932) System Federation v. Wright 364 U. S. 642 (1961)] then a decree should also be subject to interpretation, where interpretation is fairly required, in the terms of the law, then existing, so that the obligation flowing therefrom would be adjusted and appropriate to the time and circumstance.

"In fashioning and effectuating (emphasis added) the decree the Courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." Brown v. Board of Education, 349 U. S. 294 300 (Brown II).

2. SHOULD THE COURT HAVE INTERVENED AND ORDERED THE ADOPTION OF AN ALTERNATIVE DESEGREGATION PLAN AFFECTING THREE ELEMENTARY SCHOOLS OF A THIRTY-FIVE SCHOOL SYSTEM WHERE THE REPORT OF THE SPECIAL MASTER AND THE RECORD DEMONSTRATED EXTENSIVE ATTEMPTS TO COMPLY WITH THE CONSENT DECREE?

In Brown v. Board of Education, 349 U. S. 294, 299 (Brown II) the Court plainly held that school authorities have the primary responsibility for elucidating, assessing and solving the problems associated with implementing desegregation procedures. If, however, school authorities fail in their affirmative obligations judicial authority may be invoked. Swann v. Charlotte Mecklenberg Board of Education 402 U. S. 1 (1971).

In this case, the school authorities had begun

affirmative action even before entry of the Consent Decree. These are recited in the Preamble to that decree:

(1) Two of the schools with the highest concentration of Black and Puerto Rican students were closed as regular schools and established to house students in a special educational program, Follow-Through.

(2) A program entitled PROJECT-CONCERN was begun, resulting in a number of black students attending school in substantially all white districts.

(3) The first stage of an extensive construction program calling for three new Middle Schools had been planned and undertaken .

(4) A program had been implemented to insure equal educational opportunities for non-English speaking students.

The Report noted that in 1977 (about four years after the Consent Order) the North End Middle School was under construction; the East End Complex had been opened in 1974 and the West End facility had opened in 1976, and stated that the Court had recently viewed the last and that it demonstrated an impressive investment in plant, curriculum, staff and planning. (Report, page 4, Appendix, page 186.)

The Report further showed that the disputes now centered (as indeed, it had since the original proposal of Plan H) around three schools of the thirty-five school system, namely, Duggan, Barnard and Maloney, and involved about 540 to 580 children of a school population of 17,654 (12,267 white, 3,613 black, 1,735

Spanish surnamed or Hispanic, 31 American Indians and 9 Asian-Americans). Duggan School is noted as being 40% minority with 40 Hispanic children, while Barnard was less than 11% minority as opposed to Maloney's 87% minority with over 170 Hispanic children. The report found, at least implicitly (Report, page 5, Appendix page 187), that this distribution of Hispanic children resulted from a concentration of Hispanic families in one area of the City. Neither the High Schools nor the Middle Schools were found to be neighborhood schools. All had attendance zones of large areas and concomitant busing. (Indeed the High Schools were never involved in this litigation.)

One additional fact ought perhaps to be noted from the record - Defendants' Motion to Modify Consent Order (Appendix, page 86) at paragraph 9 shows the contract cost of the North-Central Middle School Complex alone to be \$18,024,000.00.

When pieced together these facts show extensive progress.

The Special Master did, of course, subject the various plans offered by the Board in its attempt to desegregate the Maloney/Barnard/Duggan area to sharp criticism, but it must be remembered that the Court, in its final order, did have an additional plan before it, not offered to the Magistrate - Plan Z.

Admittedly, Plan Z was a last-minute entry and not supported with detail as it ought to have been. It contained three provisions: (a) busing of 75 children from Barnard School District to Maloney (selecting the 75 living furthest from Barnard and hence already busing to Barnard), (b) transferring 25 volunteers from Maloney to Barnard, and (c) adjusting the Barnard /Duggan school district boundaries to maximize integration.

If no provision other than the transfer of 75 pupils

from Barnard to Maloney had been put into effect, that alone would have resulted in a total Maloney enrollment of about 265 students of whom 170 would be minorities and 95 majority, resulting in a 64/36 ratio. The transfer of the additional 25 would further improve the resulting student mix at Maloney to 49% minority to 41% majority.

Similarly, the alteration in the Barnard School student body by the transfer out of 75 majority students and the transfer in of 25 minority students would result in an acceptable minority/majority ratio at that school. Duggan School, as noted before already existed as an integrated school, being 40% minority and 60% majority. Plan Z would by this analysis have yielded wholly satisfactory results with the least disruption. Each neighborhood would have retained a neighborhood school. The 75 children bused from Barnard were already being bused within the Barnard district and would simply have been bused the short additional distance to Maloney. The overall result could not be characterized as a burden upon any one group. All of this would have been achieved even without implementing the third provision of Plan Z - adjusting the Barnard / Duggan school district lines. That provision would seem to have been adequate to adjust any shortfall in execution of Plan Z - for instance, had there been less than the projected 25 voluntary transfers from Maloney to Barnard.

Viewing the overall record of compliance, the dimensions and composition of the public school system and the relatively small student population in the disputed Maloney/Barnard/Duggan area, it is urged that the Court ought to have subjected Plan Z to further study, either by the Special Master or by the Court itself, before intervening as it did and ordering Amicus Plan C into effect.

CONCLUSION

The Order appealed from should be set aside, and this action should be returned to the District Court for a further hearing on and consideration of school desegregation plans. As to any plan offered at such hearing by the defendants, the District Court on evaluating the same, should first determine whether the defendants, in preparing and proposing the same, have an interest and purpose to segregate elementary school children. In the alternative, the order appealed from should be set aside and this action returned to the District Court for further evaluation of defendants' Plan Z.

TABLE OF AUTHORITIES

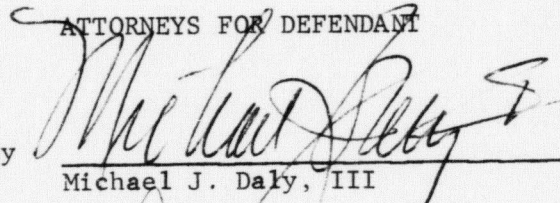
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CERTIFICATION

This is to certify that a copy of the Brief and Appendix was sent this fifteenth day of August 1977, to Kenneth Kimmerling, Esquire, Puerto Rican Legal Defense Fund, 95 Madison Avenue, New York, New York 10016; Attorney Alice Bussiere, New Haven Legal Assistance Association, Inc., 413 Howard Avenue, New Haven, Connecticut 06519; Joseph Montwell, Esquire, Waterbury Legal Aid and Reference Service, 61 Field Street, Waterbury, Connecticut 06702; Leigh Manasevit, Education Section, Civil Rights Division, U. S. Department of Justice, Washington, D.C. 20530; Joseph D. Garrison, Esquire, Garrison & Kahn, 152 Temple Street, New Haven, Connecticut 06510; Jonathan Silbert, Esquire, Silbert Wies & Crane, 63 Trumbull Street, New Haven, Connecticut 06510.

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